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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 969

SONKEN-GALAMBA CORPORATION, A CORPORATION, AND THE TANK CORPORATION, A CORPORATION,
(Plaintiffs and Appellants Below) Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, A CORPORATION; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS, A CORPORATION; AND THE TEXAS AND PACIFIC RAILWAY COMPANY, A CORPORATION,
(Defendants and Appellees Below) Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Introductory Statement.

Petitioners herein seek to have this Court review a judgment of the Circuit Court of Appeals for the Eighth Circuit, dated January 8, 1942 (R. 3873), affirming a judgment of the United States District Court for the Western District of Missouri, Western Division, dated July 3, 1940 (R. 193-204), holding that defendants below (respondents here) had committed no unlawful acts toward plaintiffs

below (petitioners here), in violation of the Interstate Commerce Act, and that in no event had plaintiffs below, and petitioners here, suffered any damages.

Opinions Below.

Opinion of the District Court, denying motion of petitioners for summary judgment under Rule 56 of the Rules of Civil Procedure, was filed July 27, 1939, and is reported in 28 F. Supp. 456. Opinion of the District Court finding for respondents on the merits, after trial without a jury, was filed July 3, 1940, and is reported in 33 F. Supp. 814. Opinion of the District Court on motion of petitioners for new trial and for additional findings of fact was filed July 31, 1940, and is reported in 34 F. Supp. 15. Opinion of the Circuit Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court, was filed January 8, 1942, and is reported in 124 F. (2d) 952.

Statement of Facts and Rulings of Courts Below.

The facts of this case and the essential findings of the courts below are not apparent from a reading of the petition herein. In petitioners' summary of matter involved there is set forth a wholly inaccurate and inadequate statement of the case, consisting principally of contentions of petitioners rejected by both lower courts.

At the outset it should be pointed out that this was not a case involving either the reasonableness or discriminatory character of any rate. No such allegation was made. The suit was one to recover damages; and the essential facts concerning the nature of such suit and the findings of the courts below are as follows:

The suit in the District Court was one under Sections 8 and 9 of the Interstate Commerce Act, wherein petitioners sought damages from respondents because of an alleged

refusal to transport, at the rates applicable to scrap iron and scrap steel, certain plates or sheets from dismantled oil tanks. While petitioners alleged that during the period when the damages are claimed to have accrued they owned certain material coming from dismantled oil tanks, their claim for damages related principally to alleged loss of profits on other materials from dismantled tanks which they alleged they would have bought, and in turn would have resold for export to the Orient at large profits, had respondents agreed in advance to transport all of said material at scrap-iron rates (R. 19, 22).

Scrap-iron rates apply only on pieces of iron or steel having value for remelting purposes only (R. 200).

The trial before the District Court, sitting without a jury, was long and arduous. As to this, the court said (R. 194, 33 F. Supp. p. 816):

> "With possibly one exception the trial was the longest in the history of this court. Thirty-three days were required for the trial proper and many days were devoted to preliminary matters. The transcript of testimony fills 4,568 pages. There were 683 exhibits. Depositions taken in many states, in Mexico and Canada, in China and Japan, were read in evidence."

Among other findings the District Court found (Finding V, R. 196-7, 33 F. Supp. p. 817):

> "Of the plates recovered from dismantled oil tanks, great quantities were remelted and were of value for remelting purposes only. Great quantities were used and were of value for purposes other than remelting: (a) for building oil tanks; (b) for constructing various kinds of storage receptacles; (c) for constructing feeding floors, building culverts, making runways, damming creeks; (d) for raw material (without remelting) for tools (chiefly an Oriental use). It is impossible from the evidence to determine what percentage of the whole mass of metal recovered and recoverable from oil tanks was or could be used and was of value for these other than remelting purposes."

The District Court further found (Finding VI, R. 197, 33 F. Supp. p. 817):

> "Plaintiffs consistently and continuously represented that the plates they had recovered from dismantled oil tanks were useful and of value for all purposes for which new plates could be used. They so advertised their plates in trade magazines, in periodicals and newspapers, in letters and orally."

Petitioners neither in the Circuit Court of Appeals nor in their petition here have ever challenged the facts set forth in the above findings of the District Court. They seek to avoid the effect of such uses of this material as determining value for purposes other than remelting under the tariff, but they do not deny such uses or the extent thereof found by the court. And they in no manner challenge the finding of the court that they consistently and continuously represented, by all manner and means, that their material had value for all purposes for which new steel plates could be used.

The court further found (Finding XII, R. 198-9, 33 F. Supp. p. 818), that there was not tendered by petitioners to any respondent company for transportation (except as certain mandamus suits hereinafter discussed may have constituted a tender as to certain specific quantities of tank plates) any carload of plates from dismantled oil tanks having value for remelting purposes only. Likewise, this finding of the court is not challenged by petitioners. It was their demand at all times that respondents handle at scrap-iron rates all tank plates owned by them, without regard to condition of the material or its value for the uses to which it would be put (R. 2271). On the other hand, it was at all times the position of respondents that they would handle at rates applicable to scrap iron any plates tendered to them which were in such condition as to have value for no purpose other than remelting (R. 537, 558-9, 560, 582, 3218-9, 3221). Respondents' refusal to accede to the demand of petitioners, that all such plates be handled without regard

to condition or value, was proper. As to this, the Circuit Court of Appeals said (R. 3886):

> "Except as to that material involved in the mandamus suits, the defendants, it now appears, were right in declining to accept and transport it at scrap rate."

Apart from any question as to the character of the material involved, the trial court found (Finding XIII, R. 199, 33 F. Supp. p. 818; R. 229-30, 34 F. Supp. 16) that petitioners suffered no damages, and this finding was approved by the Circuit Court of Appeals (R. 3884-86).

Both the District Court and the Circuit Court of Appeals recognized that certain specific quantities of tank plates, which were involved in the mandamus cases referred to in the petition, were determined by the judgments in those cases to be entitled to be carried at the scrap-iron rate, but both courts found that petitioners sustained no damages whatsoever as to those specific quantities. As to this specific material the Circuit Court of Appeals said (R. 3884):

> "Ordinarily, the measure of damage for the wrongful refusal of a carrier to accept and transport freight is the difference between the market value of the commodity at the time it should have been transported and such value when actually delivered. The court made a finding of no damages. The evidence warranted the court in finding that the market for plaintiffs' materials was rising from the latter part of 1936 until July, 1937, so that there was no basis for claim of loss of market. As to the 4,868 tons which plaintiffs claim was a part of the identical material involved in the mandamus suits, there was a considerable period of time following the issuance of the writs of mandamus during which the market value was as high or higher than it had been at any time prior to the issuance of the mandamus writs. Plaintiffs' testimony indicates that the 4,868 tons were made up of two consignments, one of 570 tons located at Wink and Wickett, Texas, involved in the Fort Worth mandamus suits, and one of 4,298 tons, located at Ramona, Oklahoma, involved

in the Kansas City mandamus suit. As to the 570 tons, it appeared that a representative of the carrier inspected the shipment at Wink, Texas, on March 16, for the purpose of determining its proper classification, but before he had made a report the plaintiff Sonken-Galamba Corporation, had already filed mandamus suit on March 17, 1937. Cars for loading were furnished as requested on March 24. The delay was negligible and there was no showing of loss of market. As to the 4,298 tons located at Ramona, Oklahoma, it appears affirmatively that this material was not purchased until April 23, 1937, almost a month after the termination of the period during which plaintiffs claim they suffered damages. It was not conceded by the defendants that this material was the identical material involved in the mandamus suit, and the trial court did not so find. Testimony with reference to the identity of this material is vague and indefinite, but if it be conceded that the proof might sustain a finding not made by the court that 4,868 tons of the material in controversy were on hand and involved in the mandamus suits, yet there is no substantial evidence that plaintiffs suffered any damages in connection with this material."

The above clearly refutes the statement on page 7 of the petition, that "While all this was going on the price of scrap dropped sharply."

On page 8 of their petition, petitioners state the Circuit Court of Appeals held they were not entitled to damages because their claim was bottomed on injury to their business as a whole including material not involved as well as that involved in the mandamus cases, and under the court's view that such unadjudicated material was not scrap there could be no recovery. Such statement of the Circuit Court's finding is incomplete and inadequate. That court also held, as to all materials, that petitioners were not damaged because there was a rising market from the

latter part of 1936 until July, 1937 (R. 3884), and further stated (R. 3886):

> "Whether or not plaintiffs would have realized profits from their business had there been no freight controversy with the defendants leads inevitably into the realm of conjecture and speculation."

The above-quoted language of the court below clearly and completely refutes the claim of petitioners that the Circuit Court held damages were not recoverable solely because of the rightful refusal to transport the commodity in question as scrap, and that if it should ultimately be determined that the commodity was scrap then damages must be assessed. The court clearly held petitioners suffered no damages whatsoever irrespective of whether the tank plates involved were scrap iron or not.

Questions Presented.

The record in this case does not justify the presentation of any question to this Court, in view of the fact findings by both the trial court and the Circuit Court, to the effect that, although petitioners' suit was one for damages, no damages were sustained. Petitioners do not even contend that such fact findings are subject to review by this Court and, therefore, seek to evade and circumvent such findings by presenting two questions which, even if determined in their favor, would furnish no reason for reversal of the judgment of the District Court or the Circuit Court of Appeals. Apart from this controlling feature of the case, the record discloses that petitioners' statement of the questions presented is neither accurate nor fair.

1. Petitioners state there is presented the question whether or not the test for application of scrap-iron rates to any commodity, "having value for remelting purposes only," applies to each specific shipment tendered to a

carrier, or does it refer to a given commodity as a class, having regard to the national commerce therein as a whole, and contend that the true test is that value which is definite, uniform and general as distinguished from local, personal or partial values; and inferentially represent that there is a different view as to these tests taken by the eastern and western railroads and the rate bureaus in the respective territories. No such differences between eastern or western railroads, or their respective bureaus, exist, as will be hereinafter specifically developed.

Truly, the question presented by petitioners is whether thousands of tons of first-class, second-hand tank plates, sold at prices far in excess of the current quoted scrap-iron prices for actual use in the reerection of other storage tanks, in the manufacture of smaller tanks, and in many other uses in lieu of new steel, may be transported at scrap-iron rates under tariffs stating those rates are applicable only on pieces of iron or steel having value for remelting purposes only. The accurate statement of petitioners' real contention indicates its absurdity. The answer is that any such construction of plain English words is without basis in sound reason or logic.

2. Petitioners further state the question is presented whether, under the Interstate Commerce Act, a final judgment against a railroad adjudging a classification of specific material, conclusively settles the classification of all similar shipments of material of the same class by any and all subsequent shippers, at least as far as that carrier is concerned. To so hold would vest the courts with legislative, not judicial, power. As to Federal legislation, only the Congress of the United States, or the Interstate Commerce Commission to a limited delegated extent, may exercise that function.

ARGUMENT.

The Courts' Findings That Immense Quantities, Perhaps the Greater Part, of Plates Recovered From Dismantled Oil Tanks Were Used and Were of Value for Purposes Other Than Remelting, Were Required by the Evidence Introduced, and Clearly Established the True Character of Said Material as Being Other Than Scrap Iron as Defined in the Applicable Tariffs.

As heretofore pointed out, the District Court found that a great part of these plates from dismantled oil tanks (R. 196), perhaps the greater part (R. 203), had value for other than remelting purposes, and such finding was approved by the Circuit Court of Appeals (R. 3881). Also as heretofore pointed out, petitioners do not challenge these essential findings of fact, but ignoring the plain, simple meaning of the ordinary English words used in the tariff, would contend that the broad use of this material for other than remelting purposes does not establish value for purposes other than remelting because such values were "local, personal or partial values" rather than values of the commodity as a class. The evidence of record clearly refutes such contention. Let us examine the facts.

By deposition prior to trial, and by the testimony of witnesses produced at the trial, respondents established, in the period 1936 to 1939, inclusive, the use of 148,000 tons of plates from dismantled oil tanks in lieu of new steel plate, in the vast territory from the Mississippi River to the Pacific Coast, in Illinois and Alabama east of the Mississippi River, and in the Orient. Of this tonnage, 83,427.69 tons were used in the reerection of large oil storage tanks, 34,235.88 tons were used in this construction of small

welded tanks, and 30,917.47 tons went into various other miscellaneous uses in lieu of new steel plate. Certainly there is nothing local, personal, or partial in the broad territorial and functional use of this material disclosed by the evidence. There is attached hereto, as an appendix, a statement referring to the witnesses and place in the record where such testimony may be found, and the method of arriving at the total tonnage referred to.

Dealing only with the tonnage of this material handled by petitioners, Exhibits 2066, 2067 and 2068, being an abstract of sales during the same period by petitioners Sonken-Galamba Corporation, The Tank Corporation, and Sonken-Galamba Supply Company, an affiliated corporation to which substantially all of the tank plate formerly belonging to petitioners was transferred in October, 1937 (R. 986), show that these corporations, in such period, sold a total of 90,895 tons, of which material only 12,995 tons was sold to steel mills or brokers for steel mills, 22,041 tons sold to exporters, and 55,899 tons sold to other classes of purchasers. So that, therefore, of this vast tonnage handled by petitioners and their affiliate, only 14¼ per cent was sold to steel mills or brokers for steel mills. It is apparent, therefore, that the claim of petitioners that the definite, uniform or general value of this commodity was for remelting purposes, is completely without foundation and overwhelmingly refuted by the evidence.

The evidence clearly establishing that the principal and predominant use of these dismantled oil tanks was for various industrial and structural uses other than remelting, in the broad territory from the Mississippi River to the Pacific Ocean and in the Orient, petitioners, in the courts below and here now, attempt to run out to another territory as to which there is no specific evidence and claim that in the eastern part of the United States the principal use of this material is for remelting. Let us examine the background of this unfounded contention.

In their complaint in this proceeding (Par. 7, R. 4) petitioners alleged that in certain places in the United States, particularly in Texas, Oklahoma, Kansas, Louisiana, Wyoming and Arkansas, by reason of certain factors among which were depletion of oil fields and proration laws, many oil storage tanks had become available for purchase; and further, in Paragraph 13 of their complaint (R. 8), petitioners alleged that Sonken-Galamba Corporation, through its efforts and foresight, had accumulated substantially the only large and readily available quantity of this material, which it dubbed "scrap iron and steel," of this uniform character and analysis in the United States or in the world. Respondents' investigation and evidence thus lay within the territory where petitioners stated was the only large and readily available supply of this material in the world. There are further and additional answers to this contention of petitioners. It is obvious that within any reasonable time respondents could not have extended their investigation and production of testimony to the entire United States. Such investigation and production of testimony as respondents were able to accomplish was done over the vigorous objection of petitioners, as indicated on page 40 of their brief filed in the Circuit Court of Appeals, where, referring to respondents' taking of depositions to establish this testimony as to the use of materials, they state:

> "* * * appellants finally filed an application in the trial court to end this oppressive, utterly immaterial and meaningless stratagem."

It is with ill grace that petitioners represent to this Court (page 22 of their petition) that respondents carefully limited their inquiry so as not to reveal the value and use of this commodity east of the Mississippi. Respondents' inquiry was directed to the territory in which petitioners stated lay the principal supply of this material. And without foundation in fact is the statement,

on page 7 of their petition, that the facts developed by the testimony of respondents were never denied. They were vigorously denied until respondents proved otherwise. Prior to the production of this overwhelming testimony by respondents, one of petitioners' principal witnesses had testified that the amount of this material used for other than remelting purposes was one-half of one per cent (R. 1915). Particularly apt is the language of the District Court (R. 202, 33 F. Supp. p. 819):

> "Plaintiffs' counsel, now recognizing, as they are compelled to do by the record here, that immense quantities of secondhand plates from dismantled oil tanks actually were used and of value for other than remelting purposes, * * *"

Now that, over the vigorous objection of petitioners and contrary to their contentions, respondents have established the uses of vast quantities of this material for purposes other than remelting west of the Mississippi Piver and in the Orient, petitioners boldly assert that in the territory east of the Mississippi River the principal use of this material is for remelting. The record does not sustain any such contention. A single witness produced by petitioners testified that such material had been remelted in the East (R. 868), but cited specifically not a single indentifiable pound or a single plate which had been dismantled and remelted.

However, respondents do not take the position, and it is not the law, that these plates from dismantled oil tanks are either scrap iron or not, dependent upon any percentage of total use of all of such material in the country, either for remelting or for other commercial purposes. Respondents have shown that the predominant part of such material coming from tanks dismantled in western territory was broadly and widely commercially used for purposes other than remelting, and under the existing tariff such material was not scrap iron. As to

any kind of tank plate in the East the same rule would apply. If such material had reached such a stage that it no longer had any value for purposes other than remelting, it would be scrap iron. If it was in such condition that it had a further commercial value it would not be scrap iron and scrap-iron rates would not apply. Thus, the Commission held in *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 136 I. C. C. 703, that scrap-iron rates did not apply to the old and imperfect boiler and floor plate there involved because it had value for other purposes than remelting. The territory covered by this complaint was Wisconsin, Illinois, Indiana, Ohio, Michigan, Kentucky, Pennsylvania, New York and West Virginia, principally Official territory east of the Mississippi River.

Obviously, whether any given shipment is scrap iron or not must be determined by the condition of that shipment. Any other test is totally impracticable. As was stated by the District Court (R. 203, 33 F. Supp. p. 820):

> "The tariff was intended to be applied in a practical fashion by laymen. It was not intended that before it was applied a nation wide study must be made, that it must be ascertained what amount of such material was available in the country, what the national demand for other than remelting purposes is and then that the national supply should be weighed against the national demand."

Also pertinent is the following language of the Circuit Court of Appeals, Fifth Circuit, in *Macon, D. & S. R. Co.* v. *General Reduction Co.*, 44 F. (2d) 499, 501:

> "In the case at bar the question was not whether fuller's earth ought to be hauled as clay, and at the same rate. That question had already been determined by the commission and answered in the negative, and a different and higher rate fixed for fuller's earth. The sole question is whether the material tendered is fuller's earth, a question on which the commission has no superior knowledge. It is also a ques-

> tion whose answer has no general importance, for it may arise as to each car tendered anywhere, and will depend on an examination of each shipment for itself."

Similarly, whether a shipment is scrap iron or not must depend on an examination of such shipment itself.

Totally misleading and inaccurate is the statement on page 4 of the petition, that such of this commodity as the eastern mills would absorb was sold and shipped to them. There is not the slightest record support for any contention that the eastern mills could not absorb all of this material if shipped to them. As heretofore pointed out, the evidence showed that of the material traded in by petitioners and their affiliate, only 12,000 tons out of a total of 90,000 tons were sold to steel mills or brokers for steel mills. The very obvious reason why petitioners did not sell more of this material to eastern mills, or to any other mills, for remelting, was because they could obtain very much higher prices from other persons who used it for purposes other than remelting. Speaking of this material, the Circuit Court of Appeals said (R. 3881):

> "The average price received was far in excess of the going market value of scrap iron."

This finding of the court is in no way challenged by petitioners. Further corroborating this fact is that although Sheffield Steel Corporation, with four open-hearth furnaces at Kansas City and remelting facilities at St. Louis, Missouri, and Sand Springs, Oklahoma, is at the very door of petitioners, and a large proportion of all scrap iron used by those mills is purchased from petitioners, petitioners never sold one car of these tank plates to that large remelter of scrap iron (R. 3284).

There Is No Different Application of the Scrap-Iron Tariffs by Eastern and Western Railroads.

Equally unfounded and without record support is the contention presented on pages 3 and 10 of the petition that there is any different treatment of this material, as a class, by the railroads east of the Mississippi River and those west of the Mississippi River, or that this material is in any way regarded differently in those territories. There is no confused situation as to the application of the tariff in the territories east and west of the Mississippi River. The refutation of this baseless contention is found in the petition itself. It clearly appears (pages 5 and 6) that the discussion between the inspection bureaus in the Western and Official Classification territories related to specific shipments of plates, and had nothing to do with this material as a class. The letter of the Official Classification Committee (R. 380), reproduced at page 5 of the petition, states:

> "* * * that if it is proven to the satisfaction of the terminal line that the shipments had value only for remelting purposes and are actually remelted, the scrap iron ratings would apply thereto."

Thus, the position of the Official Classification Committee and the lines in eastern territory is identical with that of the lines in western territory; that is, whether a given shipment is or is not scrap iron must be determined by an examination of the particular shipment. In western territory, Exhibit 2032 (R. 3345-6) indicates that the Western Weighing and Inspection Bureau was of the opinion, as to certain specific material inspected, that a part of such material could be used for other than remelting purposes, but that another part could not be used for any other purpose and was entitled to the scrap-iron rate. Likewise, as to another particular quantity of this material (R. 558-9), the Western Weighing and Inspection Bureau advised the Missouri-

Kansas-Texas Railroad that in its opinion, of sixteen cars inspected, five were found to contain scrap iron having value for remelting purposes only.

The Courts Below Have Followed the Well-Settled and Sound Construction of the Scrap-Iron Tariff.

Scrap-iron rates apply solely to material "having value for remelting purposes only." These words are simple, direct, English words, plain and unambiguous in their meaning, and the courts and the Interstate Commerce Commission have given to them the plain, clear meaning they convey. And contrary to the assertion of petitioners, and in simple logic, the use to which an object is put is broadly determinative of its value. In *Crancer* v. *Lowden*, 121 F. (2d) 645, scrap-iron rates were held inapplicable on second-hand used pipe thread protectors. At page 649 of its opinion the court said:

> "But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were."

This Court has heretofore granted certiorari in that case, but in so far as the particular holding of the court just quoted is concerned, such doctrine is in full and complete accord with the long and settled interpretation of this very tariff provision by the Interstate Commerce Commission. And this Court and other courts have always accorded great weight to the decisions of the Interstate Commerce Commission in matters involving interpretation of tariff provisions, and this should be especially so where the wording of the tariff provision in question was prescribed by the Commission itself. *Chicago Great Western R. Co.* v. *Postal Telegraph-Cable Co.*, 245 F. 592, *United States* v. *Pennsylvania R. Co.*, 21 F. (2d) 579.

Of extreme significance is the report of the Commission

in *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 136 I. C. C. 703, which involved the reasonableness and applicability of the rates on certain iron and steel material shipped to Milwaukee from points in Illinois, Indiana, Ohio, Michigan, Kentucky, Pennsylvania, New York and West Virginia. Of particular interest in this proceeding is the fact that the Commission held that the scrap-iron rates were inapplicable to dismantled boiler and floor plates the corners of which were sheared off and then rerolled to appropriate thickness for washers. Part of the material was used for the manufacture of washers without employing any reheating process. At page 706 the Commission said:

> "Although some of the material was reheated and rerolled, it is generally conceded that this process, by which the material is softened but not reduced to a molten state, is not the equivalent of remelting. As the material manifestly has a recognized commercial value for purposes other than remelting, as indicated by the use which complainant makes of it, it does not come within the definition of scrap iron as carried in defendants' tariffs."

In *Wisconsin Waste and Wiper Co.* v. *C. & N. W. Ry. Co.*, 196 I. C. C. 459, the Commission stated at page 460:

> "The use to which a commodity is put is not determinative of the applicable rate, but the use may be considered in determining the nature of the commodity."

Pertinent also is *Schwartz* v. *St. L.-S. F. Ry. Co.*, 51 I. C. C. 145. There the complainant, engaged in the scrap iron business at St. Louis, Mo., claimed scrap-iron rates were applicable on old boiler flues and tubes. The evidence indicated these flues were damaged to such an extent as to render them unfit for further use in the manufacture or repair of boilers, but they were in such shape and condition that, after being cleaned, trimmed, and otherwise reconditioned, they could be utilized, without remelting, as pipe,

fence posts, or for other purposes. The Commission held that these usages constituted a recognized commercial value other than that of elementary metal and that scrap-iron rates were not applicable.

In *Weissbaum & Co.* v. *Director General*, 53 I. C. C. 681, complainant also claimed applicability of scrap-iron rates on old pipe and boiler flues and tubes. It had a large plant equipped with shears, hydraulic presses, acetylene torches, tumbling machines, etc., for the conditioning and remanufacturing into fence and sign posts and pipe for irrigation on farms, of discarded iron pipe and boiler flues and tubes which have outlived their usefulness for steam purposes. Complainant contended the material should be classified as scrap iron because its value was determined by the value of scrap iron for remelting purposes. The Commission, however, found that this material did have value for other than remelting purposes as indicated by its use, and that scrap-iron rates were not applicable.

In *Southern Scrap Material Co.* v. *New Orleans G. N. R. Co.*, 159 I. C. C. 266, the Commission held that scrap-iron rates could not be applied to second-hand railway-track rail in original form as taken from roadbed, because it could be used for its original purpose as holes were bored in ends so that each rail length could be joined together.

Also to the same effect as the foregoing cases are:

Union Smelting and Refining Co. v. *Pennsylvania R. Co.*, 152 I. C. C. 434.

Hyman-Michaels Co. v. *N. & W. Ry. Co.*, 126 I. C. C. 195.

Richmond Radiator Co. v. *C. & N. W. Ry. Co.*, 115 I. C. C. 743.

Alaska Junk Co. v. *S. P. & S. Ry. Co.*, 98 I. C. C. 551.

Chase Companies, Inc. v. *Director General*, 81 I. C. C. 207.

It is thus seen that the courts and the Commission have consistently and continuously given to the words "having value for remelting purposes only" their plain and clear meaning, and that where value for other purposes has been shown, as indicated by use, the scrap-iron rates have not been held applicable.

It is thus also demonstrated that completely inaccurate and misleading is the statement on page 24 of the petition that the Commission, recognizing that under a literal application of the definition there is no such thing as scrap, has repudiated a "strict sense" construction of the tariff definition. Such is simply and definitely not the fact. In the *Wrought Washer Mfg. Co. Case* cited, the Commission held specifically that the scrap iron rate was not applicable to the material in question, as its value for other than remelting purposes had been established by its use as aforesaid. While the Commission in that case gave some consideration as to whether the tariff definition of scrap iron might be improved, after a full consideration, it subsequently approved the same definition in a further hearing in the same case, *Wrought Washer Mfg. Co.* v. *P. M. Ry. Co.*, 159 I. C. C. 75, and subsequently prescribed the existing definition of scrap iron material having value for remelting purposes only for application in the very southwestern and western territory involved in this complaint in *Consolidated Southwestern Cases*, 123 I. C. C. 203, *Waste Material Dealers Assn. of Ark.* v. *C. R. I. & P. Ry. Co. et al.*, 152 I. C. C. 41, 164 I. C. C. 587, 226 I. C. C. 683.

The Mandamus Judgments Referred to by Petitioners Do Not Constitute Res Adjudicata as to Material Not Involved Therein, or Have the Effect of an Administrative Ruling for the Future as to Other Parties and Other Materials.

The judgments of the mandamus suits obviously operated only as to the specific material involved in those suits, and as to the parties thereto as to such specific material. To hold otherwise would vest the courts with legislative power, a power they do not possess. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 53 L. Ed. 150. In *Phillips* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, this Court held that when the Interstate Commerce Commission determined the reasonableness of a rate, such proceeding was not in the nature of private litigation between the shipper and the carriers, but was a matter of public concern in which the whole body of shippers was interested. No such *quasi*-legislative power is, however, vested in the courts. As stated by the Circuit Court of Appeals below, quoting from the opinion of the trial court (R. 3877-8):

> "Of course the judgment in the mandamus proceeding could not be broader and never was intended to be broader than the law upon which it was bottomed. The law was that the scrap iron or scrap steel rate should apply 'only on pieces (separate or combined) of iron or steel having value for remelting purposes only.' Obviously whether any given piece of iron or steel has value 'for remelting purposes only' depends upon its qualities and characteristics. And its qualities and characteristics must be ascertained by examination. That examination in the first instance is made by the shipper, who determines whether he believes the piece of iron or steel offered for shipment has value 'for remelting purposes only.' The second examination is made by the carrier, which determines whether the piece has value 'for remelting purposes only.' Perhaps the shipper and carrier do not agree. The con-

troversy may be submitted to the Interstate Commerce Commission. In that event the Commission will determine from examination whether the piece of iron or steel has 'value for remelting purposes only.' The controversy may be submitted to a court. In that event, the court will determine whether the piece has 'value for remelting purposes only.' The jurisdiction of the court will be limited to the discharge of that judicial function. Certainly the court will not legislate. Compare *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150. The court will not say to the parties before it: 'Hereafter when this shipper submits to this carrier a piece of iron and steel and claims it has value for remelting purposes only, the carrier will not test it by the legislative standard—Does it have value for remelting purposes only?—but by this new standard: Is the piece similar to some other piece?; or by this other new standard: Was the piece taken from a disused, obsolete, oil tank?' "

The judgments in the mandamus suits could, as a matter of law, operate only as to the specific material involved in those suits. As to that material, both of the courts below have recognized that the judgments therein are *res adjudicata*, but found as to such material that petitioners suffered no damage. Obviously, the findings of the courts, that the specific material involved in the mandamus suits was of such condition as to have value for remelting purposes only, had no bearing on the character, condition, or value of thousands of tons of tank plates not involved in those suits, not then owned by petitioners, and for the most part contained in standing tanks not then dismantled.

Summary of Reasons Why the Writ Should Be Denied.

1. The contention of petitioners that under a tariff applying scrap-iron rates to pieces of iron or steel having value for remelting purposes only, such rates should be applied to all plates from dismantled oil tanks even though the greater part of same be in good condition, can be used for all purposes for which new steel can be used, and sell on the market for prices far in excess of the prices for scrap iron, is clearly erroneous.

2. The contention of petitioners that a judgment of a court, finding that a particular quantity of plates from dismantled oil tanks consisting of twisted, bent, rusted, pitted, corroded plates have no value except for remelting, should be construed as adjudicating that all plates taken from dismantled oil tanks have no value except for remelting, irrespective of their condition, market value or use, is obviously untenable.

3. The findings of fact by the trial court and the Circuit Court of Appeals, that petitioners sustained no damages whatsoever either in connection with tank plates determined by previous judgments to be scrap iron or any other plates, for many reasons entirely unconnected with the determination of the question of the proper freight rate to be applied (R. 3883-86), would lead inevitably to the conclusion that the judgments of the lower courts in favor of respondents would not be disturbed, even though the petition should be granted and all questions presented therein determined in favor of petitioners by this Court. And for the same reason, the fact that this Court has granted certiorari in *Crancer* v. *Lowden*, 121 F. (2d) 645, No. 505, constitutes no ground for the granting of a writ of certiorari in the instant case.

It is respectfully submitted that the petition should be denied.

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